

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EUGENE P. JOHNSTON

Claimant

VS.

CITY OF OVERLAND PARK

Respondent

Self-Insured

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Docket No. 1,007,139

ORDER

Claimant appeals the June 30, 2004 Order of Administrative Law Judge Steven J. Howard. Claimant was awarded \$25 in penalties pursuant to K.S.A. 44-512a after the Administrative Law Judge (ALJ) determined that respondent had wrongfully failed to pay \$196.50 in unauthorized medical, an amount agreed to by the parties at the February 20, 2004 settlement hearing. Claimant contends the penalties Order is insufficient. Additionally, claimant alleges entitlement to attorney fees for his collection efforts. The attorney fees issue, while presented to the ALJ, was not addressed in the Order.

ISSUES

Is claimant entitled to penalties and attorney fees due to respondent's failure to pay unauthorized medical in the amount of \$196.50?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant and respondent entered into a settlement hearing on February 20, 2004, at which time claimant was presented a check in the amount of \$4,941.45, which settled all issues between claimant and respondent. At the settlement hearing, claimant's attorney noted that an additional \$196.50 for unauthorized medical, stemming from the examination and report of Lynn D. Ketchum, M.D., was included in the settlement. Respondent's attorney agreed. There were no objections to any of the amounts associated with Dr. Ketchum's \$196.50 medical bill.

After the settlement, respondent tendered to claimant a payment of \$96.50, contending that \$100 of Dr. Ketchum's bill was inappropriate as being the result of a

narrative report in conjunction with an examination. Respondent not only failed to timely object to Dr. Ketchum's bill at the settlement hearing, but actually agreed to the amount due. This failure to timely object, coupled with respondent's apparent acquiescence at the hearing, defeats respondent's claim.

Claimant served a 20-day demand letter upon respondent on April 12, 2004, with the June 30, 2004 penalty Order of the ALJ being the ultimate result. K.S.A. 44-512a allows for penalties in an amount equal to the sum of \$25 or 10 percent of the amount of the medical bill which is past due, whichever is larger. In this instance, 10 percent of \$196.50 would be \$19.65. Therefore, the ALJ was correct in ordering \$25 in penalties under K.S.A. 44-512a, and the Board affirms that finding.

With regard to attorney fees, K.S.A. 44-536(g) allows for the award of attorney fees when,

[S]ubsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim

The Board has held in the past that a penalty proceeding, initiated to collect benefits that are due and payable during the pendency of an appeal, is a proceeding that falls within the definition of K.S.A. 44-536(g) as being subsequent to the ultimate disposition of the initial claim.¹

Respondent argues that under Kansas law, attorney fees can only be awarded if there is statutory authority which allows same. Respondent contends that under K.S.A. 44-512a, only an award of attorney fees by the District Court is allowed and then only if the claimant is forced to pursue an action in District Court to collect the past due compensation. However, the language of K.S.A. 44-536(g) indicates that attorney fees are allowable when "an application for penalties" has been filed.² Respondent's contention that attorney fees are not appropriate in a K.S.A. 44-512a collection action is rejected by the Board.

However, K.S.A. 44-536(g) further provides that the Director is instructed by the legislature to award attorney fees "on the basis of the reasonable and customary charges

¹ *Simmons v. Sim Park Golf Course*, No. 186,887, 1997 WL 50106 (Kan. WCAB Jan. 31, 1997).

² K.S.A. 44-536(g); see also *Naff v. Davol, Inc.*, 28 Kan. App. 2d 726, 20 P.3d 738, rev. denied 271 Kan. 1037 (2001); *Hatfield v. Wal-Mart Stores, Inc.*, 14 Kan. App. 2d 193, 786 P.2d 618 (1990).

in the locality for such services and not on a contingent fee basis.” In order to properly award attorney fees, the amount of time associated with the litigation of the matter must be presented to the Division of Workers Compensation. In this instance, there is no evidence in the record as to what, if any, time claimant’s attorney expended in the litigation of this matter. Therefore, the Board finds that the ALJ was correct in not awarding attorney fees in this matter and affirms same.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Steven J. Howard dated June 30, 2004, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director